

EXHIBIT 1

1 KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
2 CHARLES N. FREIBERG (SBN 70890)
3 BRIAN P. BROSNAHAN (SBN 112894)
4 JACOB N. FOSTER (SBN 250785)
5 101 California Street, Suite 2300
6 San Francisco, California 94111
7 Telephone: (415) 421-6140
8 Facsimile: (415) 398-5030

9 LAW OFFICES OF CRAIG A. MILLER
10 CRAIG A. MILLER (SBN 116030)
11 225 Broadway, Suite 1310
12 San Diego, CA 92101
13 Telephone: (619) 231-9449
14 Facsimile: (619) 231-8638

15 Attorneys for Plaintiffs
16 JOYCE WALKER, KIM BRUCE HOWLETT,
17 and MURIEL SPOONER, on behalf of themselves
18 and all others similarly situated

19 **UNITED STATES DISTRICT COURT**
20 **CENTRAL DISTRICT OF CALIFORNIA**

21 JOYCE WALKER, KIM BRUCE
22 HOWLETT, and MURIEL SPOONER,
23 on behalf of themselves and all others
24 similarly situated,

25 Plaintiffs,

26 v.

27 LIFE INSURANCE COMPANY OF
28 THE SOUTHWEST, a Texas
corporation,

Defendant.

CLASS ACTION

CASE NO.: CV 10-9198 JVS (RNBx)

Formerly Case No.: 3:10-cv-04852
JSW
from Northern District of California

**PLAINTIFFS' [PROPOSED]
SURREPLY IN OPPOSITION TO
LSW'S MOTION TO APPOINT A
SPECIAL MASTER**

District Judge James V. Selna
Courtroom: 10C

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
101 CALIFORNIA STREET, SUITE 2300
SAN FRANCISCO, CALIFORNIA 94111

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
101 CALIFORNIA STREET, SUITE 2300
SAN FRANCISCO, CALIFORNIA 94111

1 **I. LSW’S SEVENTH AMENDMENT ARGUMENT IS UNAVAILING**

2 In its Reply, LSW argues for the first time that undertaking the special
3 master process after trial of common issues but before trial of individual issues
4 would run afoul of the Seventh Amendment. *See* Reply at 7 n.9 (citing new
5 authority). Putting aside the fact that introducing this argument for the first time
6 on reply is improper, LSW is simply wrong in its statement of the applicable rule
7 under the Seventh Amendment.

8 LSW asserts that “[a]ll liability issues have to be determined by the same
9 jury” (Reply at 7 n.9), but this misstates the standard, which turns on whether a
10 second jury will be tasked with reexamination of the same issues that were decided
11 by the first jury. *Id.*; *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1303 (7th Cir.
12 1995) (“[T]he judge must not divide issues between separate trials in such a way
13 that *the same issue is reexamined by different juries.*”).¹ Assuming that LSW has a
14 right to a jury trial on individual issues, there would be no infringement of Seventh
15 Amendment rights here because those issues would not have been decided by the
16 jury deciding common issues. Charles Alan Wright, et al., *Fed. Prac. & Proc.* §
17 1801 (3d ed. 2012); *see also Arthur Young & Co. v. U.S. Dist. Ct.*, 549 F.2d 686,
18 697 (9th Cir. 1977) (bifurcating individual issues from trial of common issues does
19 not violate Seventh Amendment rights).

20 As discussed in *Kendrick v. Standard Fire Ins. Co.*, 2010 U.S. Dist. LEXIS
21 135694, at *33-34 (E.D. Ky. Sept. 30, 2010),

22 [T]hat any true factual disputes will arise in conjunction with class
23 membership, and that any such disputes will go expressly to liability,
24 is anything but certain. . . . But if such genuine factual disputes were
25 to occur, a violation of Defendants’ Seventh Amendment rights is not

26 ¹ In *Rhone-Poulenc*, cited by LSW, the court found that reexamination would occur
27 where the first jury would determine defendants’ negligence (but not liability), and
28 subsequent juries would determine issues such as comparative negligence, which
overlapped with and would require reexamination of the issue of defendants’
negligence. 51 F.3d at 1303. No such overlap or reexamination would occur here.

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1 automatic. Specifically, the right protects dividing issues between
2 separate trials in a way that prompts reexamination of the same
3 essential issue by separate juries.

4 If LSW has any right to present individual defenses (*e.g.*, that a particular
5 person did not rely on the illustration), it can present such evidence to a second
6 jury after the determination of common issues. The second jury will not be asked
7 to reexamine common issues decided by the first jury. For example, a presumption
8 of reliance will arise from common proof of materiality in the first trial; if LSW is
9 entitled to try to rebut that presumption as to particular individuals, that will have
10 no effect on any common issues decided by the first jury.

11 **II. LSW MISSTATES PLAINTIFFS' POSITION REGARDING THE**
12 **SPECIAL MASTER**

13 LSW contends that Plaintiffs' "new proposal" is to have the special master
14 adjudicate liability issues, and that adjudication of liability issues exceeds the
15 scope of a master's authority under Rule 56. Reply at 6 & n. 8. But Plaintiffs have
16 never suggested that the special master should adjudicate liability issues. Plaintiffs
17 have consistently noted that proof of *class membership* could be determined with
18 the assistance of a special master after trial of the common issues. Plaintiffs'
19 Submission Regarding Identification of Class Members (Dkt. 339) at 10-12;
20 [Proposed] Reply to LSW's Substitute Supplemental Memorandum (Dkt. 348-1) at
21 13-14. Plaintiffs also have consistently taken the position that to the extent LSW
22 possesses defenses, such as lack of reliance, to the claims of individual
23 policyholders (as to which, thus far, LSW has put forward little if any evidence),
24 such issues can be deferred until after resolution of the common issues. Plaintiffs
25 have not suggested the use of a special master to adjudicate such issues.

26 **III. LSW MISSTATES PLAINTIFFS' ARGUMENT REGARDING ONE**
27 **WAY INTERVENTION**

28 LSW contends that Plaintiffs "suggest the one-way intervention rule does
not apply to subclasses." Reply at 4 n. 5. But Plaintiffs do not make that assertion.

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1 A policyholder who is both a class and subclass member and who does not opt out
2 will be bound by the adjudicated results in this case. This Court has already held
3 that there is no possibility for one-way intervention in the context of this case
4 because class and subclass claims “are premised on the same factual predicate, and
5 as such, would be barred from re-litigation.” Class Certification Op. (Dkt. 353) at
6 34-35 (citations omitted). Any policyholder who does not opt out is either (1) a
7 member of the subclass and thus bound by the results in this case or (2) not a
8 member of the subclass and thus cannot assert any claims belonging to the
9 subclass.

10 **IV. THERE IS NO NEED TO MEET AND CONFER ABOUT THE**
COURT’S PRIOR ORDER

11 LSW’s opening brief sought to have the Court instruct the special master in
12 numerous matters, some of which are directly contrary to the Court’s ruling on
13 class certification. After Plaintiffs briefed the many ways in which LSW’s
14 proposed order departs from the Court’s order, LSW on reply did not defend its
15 proposed order and stated simply that it is willing to meet and confer regarding the
16 instructions for the special master. Reply at 13-14. While Plaintiffs agree that, if
17 the Court decides to appoint the special master at this time, there are many issues
18 relating to the special master that should be the subject of meet and confer (and
19 Plaintiffs so stated in their Opposition Brief at page 25 & note 5), the issues
20 requiring meet and confer *do not include* the instructions already set forth in the
21 Court’s Class Certification Order (*see* Opposition Brief at 19-24). While Plaintiffs
22 do not believe that there is any need to meet and confer on any special master
23 issues until after trial on the common issues, because a special master will be
24 unnecessary if LSW prevails, any eventual meet and confer discussions should be
25 limited to logistical and procedural matters pertaining to the special master’s
26 appointment (*e.g.*, cost) and should not involve the procedures that the Court
27 already determined will guide class membership determinations. Any order
28

1 regarding appointment of a special master should make clear that the Court’s prior
2 instructions remain in place and are not subject to reexamination via “meet and
3 confer.”

4 **V. LSW MISSTATES THE LAW AND CONFUSES THE RECORD**
5 **WITH RESPECT TO ITS RETENTION OF ILLUSTRATIONS AND**
6 **OTHER DOCUMENTS**

7 LSW asserts that the California Insurance Code requires only that LSW
8 retain the illustration that is sent with the policy. Reply at 8:7-9. This is false.
9 The regulation is not limited to illustrations that are sent with the policy but
10 includes any signed illustration of the policy as applied for or as issued. *See* Cal.
11 Ins. Code § 10509.958(a)-(d). Second, LSW also asserts, incorrectly citing this
12 Court’s Class Certification Order (at 31), that LSW’s *own* policies “do[] not
13 require this information either.” Reply at 8:14-21. In fact, LSW’s own policies
14 require submission of an Agent’s Report indicating whether a sales illustration was
15 used. *See* Declaration of Victoria McDonald (Dkt. 262) ¶8.

16 **VI. CONTRARY TO LSW’S ASSERTION, MR. HOWLETT AND MS.**
17 **SPOONER DID NOT LOSE THEIR POLICY APPLICATIONS.**

18 LSW, relying on a single November 2, 2009 email, advances the assertion
19 that “Mr. Howlett and Ms. Spooner lost their applications, not long after
20 purchasing the policy,” which LSW cites as a “perfect example of the difficulties
21 that policyholders will experience in trying to determining their own subclass
22 membership.” Reply at 11:9-12 (citing Fleming Dec., Ex. A). As other documents
23 produced in discovery confirm, however, Mr. Howlett and Ms. Spooner did not
24 lose their applications, but only needed some time to find them. *See* Declaration of
25 Charles N. Freiberg in Support of Surreply, Ex. A. The very next day, on
26 November 3, 2009, Mr. Howlett faxed copies of their “life insurance applications”
27 to Steve Burgess. *Id.* That it took one day for Mr. Howlett to locate these
28 documents hardly exemplifies any “difficulty” policyholders will face.

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DATED: April 11, 2013

KASOWITZ, BENSON, TORRES & FRIEDMAN
LLP

By: /s/Charles N. Freiberg

CHARLES N. FREIBERG
BRIAN P. BROSNAHAN
JACOB N. FOSTER

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**DECLARATION OF CHARLES N.
FREIBERG IN SUPPORT OF
PLAINTIFFS' [PROPOSED]
SURREPLY ON LSW'S MOTION
TO APPOINT A SPECIAL MASTER**

Judge James V. Selna
Courtroom: 10C

EXHIBIT A

From: Steve Burgess <sburgess@cflid.com>
Sent: Tuesday, November 3, 2009 3:06 PM
To: Howlett, Kim <KHowlett@pbsj.com>
Subject: RE: Your life insurance dispute

Yes I will and I did receive them.

Thx!

From: Howlett, Kim [mailto:KHowlett@pbsj.com]
Sent: Tuesday, November 03, 2009 2:08 PM
To: Steve Burgess
Subject: RE: Your life insurance dispute

Steve:

Could you send along an email to me regarding maintaining the confidentiality of the life insurance applications I just faxed to you.

Much Thanks
Kim

Mr. Kim B. Howlett
Associate Vice President/Senior Group Manager PBS&J
direct 858-514-1018

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